APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Decided November 9, 1995 Published February 2, 1996

No. 94-7231

EDWARD S. IRONS,
Appellant

v.

JEFFREY D. KARCESKI AND
FINNEGAN, HENDERSON, FARBOW, GARRETT & DUNNER,
Appellees

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Intervenor

Appeal from the United States District Court
for the District of Columbia
(No. 94ms00243)

Per Curiam: [1] Appellant Edward S. Irons appeals from two decisions of Magistrate Judge Robinson pertaining to his involvement as a fact witness in a civil dispute in Indianapolis, Indiana. First, Irons challenges the magistrate judge's ruling that a refusal to pay more than the

[1] The Court initially ordered, on November 9, 1995, that the decision in this case be issued as an unpublished judgment, in accordance with D.C. Cir. Rule 36(c). At the request of the appellant, however, the Court has agreed to file this opinion in published form.

statutory fact-witness fee of $40 per day to Irons for his deposition testimony in the civil suit would not impose an undue burden on him. Second, Irons challenges as reversible error the magistrate judge's decision to allow counsel for two of the parties involved in the Indianapolis litigation to participate in a hearing addressing the deposition fee issue. We affirm the magistrate judge's rulings on both questions.

I. Background

Appellant Edward S. Irons is a key fact witness in *In Re Recombinant DNA Technology Patent & Contract Litigation*, MDL Docket No. 912 (S.D. Ind.) ("MDL-912"), a civil patent dispute pending in Indianapolis involving Eli Lilly ("Lilly"), Genentech, and the Regents of the University of California ("UC"). Appellee Jeffrey D. Karceski, who represents Eli Lilly in MDL-912, served Irons with a subpoena to testify at a deposition regarding his legal representation of UC from 1977-1980. At this time, Irons is not associated with any of the Indianapolis parties, and his testimony is sought solely as a fact witness.

During an exchange of correspondence following issuance of the deposition subpoena, Irons became aware that the planned deposition might last as long as three days. Believing that the statutory fact-witness fee of $40 per day, provided for in 28 U.S.C. § 1821(b), afforded inadequate compensation for the time he would have to be away from his legal practice, Irons wrote to Karceski's firm requesting compensation at his normal hourly billing rate.

Karceski's law firm thereafter sent a letter to the parties involved in the patent dispute, suggesting that each party agree (1) to compensate Irons for the proportional amount of time that party occupied during the deposition, and (2) not to raise the fact of his compensation as an issue at trial.

Later that same month, the parties involved in the Indianapolis dispute (but not Irons, who is merely a fact witness) attended a hearing before Magistrate Judge Godich in the Southern District of Indiana, during which the magistrate judge addressed the issue of compensation for fact witnesses. Magistrate Judge Godich determined that fact witnesses, including Irons, should be compensated at the statutory rate of $40 per day. Lilly's attorney relayed news of the magistrate judge's ruling to Irons, who responded with a request that Lilly seek to have the ruling vacated and a promise to move to quash the subpoena if Lilly did not comply with that request.

Making good on his promise, Irons moved in the United States District Court for the District of Columbia to quash the subpoena. In answer to Irons' motion to quash, Karceski filed a response explaining that Lilly had no objection to Irons being paid for his time. In fact, Lilly had proposed to counsel for the other parties (Genentech and UC) that Lilly would bear the entire expense of compensating Irons at the requested rate, so long as the other parties agreed not to use the fact of Lilly's payment to impeach Irons' credibility at trial. UC, however, refused to agree to the condition. Karceski suggested, in his response motion, that Magistrate Judge Robinson issue an order requiring that the deposition go forward, stating which party or parties should compensate Irons, and prohibiting impeachment based on the compensation.

On November 2, 1994, Magistrate Judge Robinson held a hearing attended by Irons and counsel for each of the three parties involved in MDL-912. Magistrate Judge Robinson determined that Magistrate Judge Godich, in ruling that an *order* for the parties to pay more than $40 per day would be inappropriate, did not intend to preclude the parties from *voluntarily* making such arrangements. However, she declined to order that such payment be made, holding that failure to pay more than the ordinary fees would not, as Irons alleged, impose an undue

burden on him. *Irons v. Karceski*, Misc. No. 94-243 (D.D.C. Nov. 2, 1994) (order denying motion to quash). Magistrate Judge Robinson's ruling leaves the parties free to make out a private arrangement for payment in excess of the statutory amount, but does not order any payment or preclude any impeachment based on the payment.

II. Discussion

Irons presents two challenges to the district court's denial of his motion to quash the subpoena. First, he claims that the subpoena imposes on him an undue burden, which Karceski took no reasonable steps to avoid, by requiring him to testify at $40 per day when he could be charging those hours at his normal billing rate. Irons alleges that imposition of this undue burden entitles him to an order under Rule 45(c)(3)(A)(iv) ("Rule 45 (c)") of the Federal Rules of Civil Procedure quashing the subpoena. Second, Irons challenges Magistrate Judge Robinson's decision to allow counsel for UC and Genentech to participate in the November 2 hearing, since neither of these parties had officially intervened in the Irons/Karceski collateral fee dispute.

A. *Undue Burden*

Iron's first challenge involves the intersection of Rule 45(c) and the statutory provision calling for the payment of $40 per day to any fact witness attending a deposition. 28 U.S.C. § 1821(b). Rule 45(c) provides that the court shall quash a subpoena which subjects a person to undue burden, Fed. R. Civ. P. 45(c)(3)(A)(iv), and imposes on the party causing the subpoena to issue the duty to take "reasonable steps to avoid imposing undue burden or expense on a person . . ." *Id.* at (c)(1).

Irons cites no authority other than Rule 45 itself for his claim that the statutory payment imposes an undue burden on him. In a strained reading of the rule, he concludes that Rule 45(c)(1)'s inclusion of "lost earn-

ings" as possible sanctions for a party's failure to take reasonable steps to avoid imposing an undue burden demonstrates that "loss of earnings . . . constitutes undue burden." Appellant's Brief at 3. In fact, the only hint the rule gives as to the meaning of "undue burden" comes by way of an illustration in the notes to the 1991 amendment, which reads: "Illustratively, it might be unduly burdensome to compel an adversary to attend trial as a witness if the adversary is known to have no personal knowledge of matters in dispute, especially if the adversary would be required to incur substantial travel burdens." FED. RULE CIV. P. 45 advisory committee's note (1991) (subdivision (c)). Clearly, the advisory committee example adds no force to Irons' claim.

Irons correctly states that this court will "interpret two statutes harmoniously to accomplish the intended purpose of each." Appellant's Brief at 14. However, he then states incorrectly that Rule 45(c) "simply provides for witness protection when compensation limited to a $40 per diem would impose an 'undue burden.'" *Id.* Irons alleges that the district court's finding that "payment of the ordinary witness fee would [not] constitute an undue burden" is clearly erroneous, but he cites absolutely no authority to back his claim. *Id.* at 15-16. Because the party seeking to quash a subpoena bears a heavy burden of proof, *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 403 (D.C. Cir. 1984), and Irons has not met that burden, we affirm the district court's denial of his motion to quash.

B. *Parties to the Hearing*

Irons' second claim, that we must reverse the magistrate judge's order because she allowed Genentech and UC to participate in the November 2 hearing, fails for at least two reasons. First, we can find no evidence in the record that Irons ever preserved this issue for appeal. In particular, the transcript of the November 2 hearing reveals

no objection by Irons at the time the court heard from these nonparties. *See United States v. Baucum*, 66 F.3d 362, 363 (D.C. Cir. 1995) ("[T]he court of appeals is not a forum in which a litigant can present legal theories that it neglected to raise in a timely manner in proceedings below.").

Second, in light of the magistrate judge's determination that Irons has no entitlement to any compensation over and above the $40 statutory per diem, we find that her decision to hear from UC and Gententech in no way injured Irons. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]he plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest. . . ."). As we understand the argument, Irons claims that *but for* UC's involvement in the negotiations, which preceded the hearing, Lilly would have agreed to compensate Irons as requested. Even assuming the truth of Irons' claim, this argument does not establish injury or redressability. By the time of the hearing before Magistrate Judge Robinson, Lilly had already declared that it was unwilling to compensate Irons unless the court issued an order that it do so. There is no indication whatsoever in the record that the court *would have* issued that order if UC had been excluded from the hearing. In fact, the magistrate judge's express finding that the $40 fee would *not* constitute an undue burden points decisively to the contrary conclusion. Since UC's presence at the hearing caused Irons no injury-in-fact, we find that the appellant lacks Article III standing to raise this complaint. *See id.*

For the foregoing reasons, the district court's order is

Affirmed.

[Filed Nov. 4, 1994]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. Case No. 94-243
HHG/DAR

EDWARD IRONS,

Plaintiff,

v.

JEFFREY D. KARCESKI, *et al.*,

Defendants.

ORDER

This action was referred to the undersigned United States Magistrate Judge for resolution of plaintiff's Motion to Modify or Quash Subpoena in a Civil Case. Counsel for the parties appeared before the undersigned for a hearing on November 2, 1994. For the reasons set forth on the record by the undersigned at the hearing, and in accordance with the undersigned's rulings from the bench, it is

ORDERED that plaintiff's Motion to Modify or Quash Subpoena in a Civil Case be, and the same hereby is denied; and it is

FURTHER ORDERED that the undersigned, by the foregoing provision, neither precludes any party from compensating the deponent nor limits the use which may be made in subsequent proceedings of the fact of such compensation; and it is

FURTHER ORDERED that counsel for the City of Hope may attend the deposition of the plaintiff for the

sole purpose of protecting the attorney-client privilege, subject to its agreement to be bound by the parties' protective order.

/s/ Deborah A. Robinson
DEBORAH A. ROBINSON
United States Magistrate Judge

[Filed Aug. 11, 1995]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-7231

EDWARD S. IRONS,

Appellant,

v.

JEFFREY D. KARCESKI, *et al.*

BEFORE: Wald, Silberman and Williams, Circuit Judges.

ORDER

Upon consideration of appellant's motion to vacate the April 6, 1995, order granting motion to intervene, it is

ORDERED that the motion be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Cheri Carter
CHERI CARTER
Deputy Clerk

[Filed May 17, 1995]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-7231

EDWARD S. IRONS,

Appellant

v.

JEFFREY D. KARCESKI; FINNEGAN, HENDERSON, FARBOW, GARRETT & DUNNER, REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Intervenor

BEFORE: Williams and Tatel, Circuit Judges

ORDER

Upon consideration of appellant's statement regarding order granting motion to intervene, which the court construes as a motion for reconsideration of its order filed April 6, 1995, granting the motion of the Regents of the University of California to intervene, it is

ORDERED that the motion for reconsideration be denied. The court has ruled on the motion to intervene, and appellant shall not relitigate the issue in his brief.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ John T. Haly
Deputy Clerk/LD

[Filed Apr. 6, 1995]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-7231

EDWARD S. IRONS,

Appellant

v.

JEFFREY D. KARCESKI; FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER

BEFORE: Williams and Tatel, Circuit Judges

ORDER

Upon consideration of the motion of the Regents of the University of California ("UC") to intervene and the response thereto; and the motion to file an out of time reply and the response thereto, it is

ORDERED that the motion to intervene be granted. UC meets all of the requirements for intervention set forth in Rule 24 of the Federal Rules of Civil Procedure, which this court has applied to a motion to intervene in an appeal from the district court. *See Building and Construction Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994). It is

FURTHER ORDERED that the motion to file an out of time reply be dismissed as moot.

Per Curiam

[Filed Dec. 13, 1995]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-7231

EDWARD S. IRONS,
Appellant,

v.

JEFFREY D. KARCESKI,
Appellee

FINNEGAN, HENDERSON, FARBOW,
GARRETT AND DUNNER,
Appellee

BEFORE: Wald, Silberman and Williams, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed November 22, 1995, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appeal No. 94-7231

EDWARD S. IRONS
Appellant

v.

JEFFREY D. KARCESKI, *et al.*,
Appellees

APPELLANT'S MOTION TO VACATE APRIL 6, 1995 ORDER GRANTING MOTION TO INTERVENE

MOTION

Appellant moves for an order vacating the Order filed April 6, 1995 granting the motion of The Regents of the University of California to intervene.

* * * *

GROUNDS IN SUPPORT OF MOTION

1. This appellate court may not engage in fact finding on its own. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) ("The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. . . . '[A]ppellate courts must constantly have in mind that their function is to decide factual issues *de novo*.' "), quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). *See also Transmatic, Inc. v. Gulton Industries, Inc.*, —— F.2d ——, Appeal No. 94-1315, -1316, decided May 1, 1995, slip op. at 8.

The order granting the motion to intervene is void because it is based on a *de novo finding by this Court* that "UC meets all of the requirements for intervention set forth in Rule 24 of the Federal Rules of Civil Procedure".

2. The April 6, 1995 order states "this court has applied [Rule 24 of the Federal Rules of Civil Procedure] to a motion to intervene in an appeal from the district court. *See Building and Construction Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994).". *Building* affirmed the district court's denial of intervention. It is not precedent which warrants grant of the motion to intervene in this case because:

(i) *Building*, 40 F.3d at 1282, states:

> The Federal Rules of Appellate Procedure do not provide for intervention on appeal except in proceedings to review agency action, but do not expressly preclude intervention in appeals from the district court. Fed.R.App.P. 15(d). In *International Union v. Scofield*, 382 U.S. 205, 217 n. 10, 86 S.Ct. 373, 381 n. 10, 15 L.Ed.2d 272 (1965), the Court recognized that "the policies underlying intervention [in district court] may be applicable in appellate courts." We see no reason to relax the standards for intervention applicable in the district court. . . .

In this case, in the absence of any relevant district court finding on any of the four requirements for intervention set forth in Rule 24(a)(2) and in the absence of any record citation, the April 6, 1995 order has indeed "relax[ed] the standards for intervention application in the district court".

3. *International Union v. Scofield*, 382 U.S. 205, 217 n. 10 (1965) pertains to intervention by a party charged with violations of the National Labor Relations Act. N. 10 states in pertinent part:

> The Federal Rules of Civil Procedure, of course, apply only in the federal district courts. Still, the

> policies underlying intervention may be applicable in appellate courts. . . .
>
> The Advisory Panel on Labor-Management Relations Law issued a report, S.Doc. No. 81, 86th Cong., 2d Sess. (1960), which contains a statement of policy that "any party to NLRB proceedings should be allowed to intervene in the appellate proceedings," p. 17.

No such statement of Congressional policy justifies the April 6, 1995 order granting intervention by UC in this case.

/s/ Edward S. Irons
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Dated: July 26, 1995

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Appeal No. 94-7231

EDWARD S. IRONS,
Appellant

v.

JEFFREY D. KARCESKI, *et al.*,
Appellees

MOTION OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA TO INTERVENE

The Regents of the University of California ("UC") files this motion to intervene in Appeal No. 94-7231 pursuant to Rule 24(a), Fed. R. Civ. Proc. On November 4, 1994, the appellant, Edward S. Irons, appealed from a ruling of the United States District Court for the District of Columbia. This appeal stems directly from a litigation in which UC is directly involved. Thus, the outcome of any decisions made by this court may affect the interests of UC. The case is captioned *In re Recombinant DNA Technology Patent and Contract Litigation*, MDL Docket No. 912 and is currently pending before the United States District Court for the Southern District of Indiana.

UC filed a motion to intervene in the lower court on August 9, 1994. Although the lower court did not issue a written order granting UC's motion, UC was permitted to state its position on the record during the November 2, 1994 hearing. Thus, UC was at least a *de facto* intervenor below.

In addition to having *de facto* intervened below, UC is entitled to intervene as a right because its interests

may be effectively adjudicated by this Court's ruling. In appellant's "Statement of Issues to be Raised," the appellant asks the court to determine "whether the district court order filed November 4, 1994 must be reversed because the district court wrongfully permitted The Regents of the University of California and Genentech, Inc. to be heard." Consequentially, the Court's ruling as to this issue may affect UC's interests. Since the appellant has raised this issue before the court, UC should be permitted to respond to any arguments presented by the parties. It is for this reason UC hereby files its motion to intervene.

Respectfully submitted,

/s/ John H. Weber
JOHN H. WEBER
D.C. Bar No. 410691
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1755 Jefferson Davis Highway
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Telephone: (703)413-3000
Attorneys for The Regents of
The University of California

Date: January 10, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Miscellaneous No. 94-0243

IN THE MATTER OF: EDWARD S. IRONS,
Plaintiff,

vs.

JEFFREY D. KARCESKI, *et al.*,
Defendants.

TRANSCRIPT OF HEARING ON MOTIONS
BEFORE THE
HONORABLE DEBORAH A. ROBINSON
UNITED STATES MAGISTRATE JUDGE

November 2, 1994

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* * * *

[10] THE MAGISTRATE JUDGE: The Court will proceed as follows. The Court, having considered the arguments, both oral and in writing, of all of the interested parties and having reviewed the transcript of a portion of the proceedings before Magistrate Judge Godich, is satisfied that Judge Godich did not intend to preclude payment to Mr. Irons in an amount in excess of the standard witness fee. However, Judge Godich did not order that such payment will be made. And this Court knows of no authority which would warrant issuance of an order requiring payment in excess of that amount.

It is undisputed that in this matter, Mr. Irons is a fact witness. The Court has reviewed Rule 45 and cannot

find that payment of the ordinary witness fee would constitute an undue burden, as undue burden is described in Rule 45. Certainly, it may in some other respects, through loss of time to pursue other matters at which he would ordinarily be compensated at a greater amount. However, that is not what Rule 45 provides. And for that reason, the Court cannot find that completion of the deposition, upon payment of the ordinary fee of $40.00 would constitute an undue burden.

For those reasons, the Court will permit the parties to reach whatever agreement they may choose to reach for compensation of Mr. Irons. More specifically, the Court will not preclude Eli Lilly, Genentech or any other party from compensating Mr. Irons for his time in attending and answering questions at the deposition. However, the Court will not order that Lilly, Genentech or any other party actually do so.

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 94-243

EDWARD S. IRONS, 555—13th Street, N.W.,
Suite 701 East Tower, Washington, D.C. 20004,
Plaintiff

v.

JEFFREY D. KARCESKI and FINNEGAN, HENDERSON,
FARABOW, GARRETT & DUNNER, 1300 I Street, N.W.,
Washington, D.C. 20005,
Defendants

DECLARATION OF EDWARD S. IRONS

Pursuant to 28 U.S.C. § 1746, under penalty of perjury, Edward S. Irons declares:

1. I am now and since 1948 have been a member in good standing of the bar of this court. My bar number is 149898.

2. I make this declaration in support of the concurrently-filed Motion to Modify or Quash Subpoena in a Civil Case, to Wit: MDL 912, *In re Recombinant DNA Technology Patent and Contract.* Said subpoena issued from this Court and I was served on or about May 3, 1994. Exhibit A to the Motion to Quash is a copy of the first page of the subpoena. The subpoena was served by Jeffrey D. Karceski, Finnegan, Henderson, Farabow, Garrett & Dunner, 1300 I Street, N.W., Washington, D.C., attorney for Eli Lilly and Company, a party to MDL 912.

3. I have responded timely to so much of the subpoena as commands the production and inspection of documents.

4. The subpoena commands me to appear and to testify at the taking of my deposition at a place designated "on May 10, 1994 at 9:30 AM *Or on a day and at a time to be mutually agreed upon".

5. I was advised by letter dated May 20, 1994 signed by Charles E. Lipsey of the firm of Finnegan, Henderson, Farabow, Garrett & Dunner that:

> While we anticipate that our examination will be relatively brief, we have no control over the length of examination by the other parties to the litigation, the University of California or Genentech. While we will consult with the other parties to limit the length of time of your deposition, it might be wise to reserve Friday, June 3, for additional examination. . . .

The deposition, however, did not proceed on June 2, 1994.

6. I was advised by letter dated July *8*, 1994 from the aforesaid Mr. Lipsey that "we believe that we will be able to go forward with your deposition on August 2-4".

7. Exhibit 1 to this declaration is a copy of my response, also dated July 8, 1994, to the letter of the same date from Mr. Lipsey mentioned in the preceding paragraph of this declaration. The Exhibit 1 response states, in part:

> [I]t does now appear that I can be available on August 3-5, 1994.
>
> * * * *
>
> When this matter was originally raised, I did not mention compensation for my time because I thought that the deposition would be short. It now looks as though it may last for three days. If it does, I would like to know what arrangements will be made

to compensate me at my normal charge rate for these three days. I do not have three days to donate to this matter.

8. Exhibit 2 to this declaration is a copy of the letter dated July 11, 1994 from Mr. Lipsey to individuals whom, I understand, are counsel for other parties involved in the litigation identified as MDL Docket No. 912. That letter states, in part:

> Mr. Irons has raised a matter which requires our collective and immediate consideration, namely, what arrangements have been made to compensate him at his normal rate for the three day deposition.
>
> I suspect that none of the parties either should or would be willing to compensate Mr. Irons for his time unilaterally. However, if the parties mutually agree that Mr. Irons would be compensated by the parties collectively, with each contributing an amount proportional to the amount of Mr. Irons' time consumed during its direct and cross-examination, and if they further agree that the fact that Mr. Irons had been so compensated would not be raised by any party for any purpose at any of the trials in these consolidated actions, then Mr. Irons' request could be accommodated.
>
> Please let me know promptly whether your clients are amenable to this proposal so that I may let Mr. Irons know promptly how we are to proceed.

9. On or about July 25, 1994 the deposition was scheduled to begin at 10:00 a.m., August 3, 1994 at the offices of Finnegan, Henderson, Farabow, Garrett & Dunner.

10. Exhibit 3 is a copy of a self-explanatory letter dated Friday, July 29, 1994 from Mr. Lipsey to me. In substance, it states that at a July 26, 1994 hearing in the Southern District of Indiana in MDL 912 (*of which I*

was not notified), Magistrate Judge Godich ruled that it would be "inappropriate" to compensate me for the time spent in giving testimony in response to the aforementioned subpoena. The Exhibit 3 letter advises that "the parties [to MDL 912] will be unable to compensate you for your time at your deposition beyond the fees normally associated with subpoenaed witnesses".

11. I do not represent any party to MDL 912. I have never appeared before Magistrate Judge Godich at any time whatsoever. I am informed that there is no reporter's transcript of the July 26, 1994 hearing, but that a tape recording was made which has not been transcribed.

12. I responded to Exhibit 3 by letter dated July 29, 1994 which calls the attention of Mr. Lipsey to F.R.Civ.P. 45(c)(1).

13. Exhibit 4 is a second letter dated July 29, 1994 by which I advised Mr. Lipsey that a motion to quash the subpoena referenced in paragraph 2 hereof, might be filed.

14. By letter dated August 1, 1994 (Exhibit 5), I advised Mr. Lipsey as follows:

> 5. I will arrive at my office late today [August 1] due to a doctor's appointment. Upon arrival I shall begin preparation of a motion to quash the subpoena to be filed on Tuesday, August 2, 1994.
>
> At your request, I will abstain from filing such motion pending disposition of a motion to vacate the Indiana Magistrate's ruling should you elect to file such a motion.
>
> I will also cooperate with you to schedule another date for my deposition after matters addressed by this letter are finally resolved.

15. My professional time is fully occupied such that all of the hours spent testifying in response to the sub-

poena would otherwise be billed to my clients at my normal charge rate.

/s/ Edward S. Irons
EDWARD S. IRONS

Date August 2, 1994